**Sasco Electric, d/b/a Sasco Valley Electric *and* Joseph A. Sweeting.** Case 32–CA–16668

September 3, 1999

## DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 18, 1999, Administrative Law Judge Joan Wieder issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Virginia L. Jordan, Esq.*, for the General Counsel.
*Katherine M. Quadros, Esq. (Quadros & Johnson),* of San Mateo, California, for the Respondent.
*Joseph Sweeting,* of Redwood City, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on March 9, 1999,[1] at Oakland, California. The charge was filed by Joseph Sweeting, an individual (the Charging Party or Sweeting), on March 3, against Sasco Electric, d/b/a Sasco Valley Electric (Respondent or Sasco). The complaint, as amended, alleges Respondent violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act).

Principally, the complaint alleges Respondent violated Section 8(a)(4) and (1) of the Act by refusing to hire employee-applicant Sweeting at a jobsite in Menlo Park, California, because Sweeting previously filed an unfair labor practice charge in Case 32–CA–15673. At hearing, evidence was also adduced, without objection, that Sweeting previously filed a grievance against Respondent.

Respondent's timely filed answer to the complaint admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts Sweeting was placed on its "not eligible for rehire" list prior to his filing the grievance and charge, both of which were dismissed as unmeritorious. Respondent also argues Sweeting could not be hired as long as he remained on the list and the decision to retain him on the list was for good cause, not discrimination because of his filing the grievance and/or charge. The collective-bargaining agreement gives the Employer the right to refuse to hire Sweeting because he is validly on their "not eligible for rehire list."

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following[2]

### FINDINGS OF FACT

#### I. JURISDICTION

Based on the Respondent's answer to the complaint, as amended, I find Respondent meets one of the Board's jurisdictional standards. I find Local Union 617, International Brotherhood of Electrical Workers, AFL–CIO (the Union) is a statutory labor organization.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### *A. Background*

Respondent is a California corporation with an office and place business in Santa Clara, California. It is an electrical contractor in the building and construction industry. Its general superintendent is Ronald Baker, who has held that position for approximately 5 years. He is responsible for running the field operations, which includes responsibility for all employees. Respondent has various collective-bargaining agreements with various locals of the International Brotherhood of Electrical Workers, AFL–CIO (the Union). Each local has its jurisdiction circumscribed geographically, by county. As here pertinent, each collective-bargaining agreement contains the same provisions concerning the employer's right to refuse to hire employees.

Hiring is done at Respondent's jobsites. The person doing the hiring depends on the size of the job. On smaller jobs, there is only a foreman. On larger jobs, there is a general foreman who oversees the other foremen. On the largest jobs, Respondent assigns a superintendent who supervises the foremen, including requests for additional electricians. Respondent also employs superintendents who are responsible for specific geographical areas. Respondent employs, on average, 750 electricians year round, and last year employed 2300 electricians during the year on various jobs.

The supervisor in charge of the job is responsible for hiring. All of its employees are referred by the various locals' hiring halls. The applicant is interviewed concerning his work background and qualifications. The applicant is observed to determine he is coherent, understands the skills required by the job and is otherwise a desirable employee. If the applicant passes the interview process, the supervisor in charge of the job calls Baker's office and determines if the individual is listed on Respondent's "not eligible for rehire list." If the applicant's name appears on the list, the supervisor is forbidden to hire the individual. There were no claimed or demonstrated exceptions to this rule.

If an individual is terminated or laid off with the designation "not eligible for rehire," that individual's name is immediately placed on the list, which is updated monthly. Yearly, Baker and Respondent's superintendents review the list to determine

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] All dates are in 1998 unless otherwise indicated.

[2] I specifically discredit any testimony inconsistent with my findings.

if any of the listed individuals should be removed or retained on the list. If these supervisors do not have personal knowledge concerning the events leading to the individuals placement on the "not eligible for rehire list," their name is removed. If one of the reviewing supervisors believes an individual's name should be removed from the list, and the others agree at the yearly review, their name would be removed.

Respondent maintains the "not eligible for rehire list" pursuant to section 2.4 of its collective-bargaining agreements, which provides:

> The Union understands the employer is responsible to perform the work required by the owner. The employer shall, therefore, have no restrictions except those specifically provided for in the collective bargaining agreement, in planning, directing and controlling the operation of all his work, in deciding the number and kind of employees who properly perform the work, in hiring and laying off employees, in transferring employees form job to job within the local union's geographical jurisdiction, and determining the need and number as well as employers and/or owners rules and regulations not inconsistent with this agreement, in requiring all employees to observe all safety regulations, and in discharging employees for proper cause.

Section 2.4 (a) of the collective-bargaining agreements provides:

> The employer shall have the right to determine the competency and qualifications of its employees and the right to discharge such employees for any just and sufficient cause. The Union may institute a grievance procedure under the terms of this agreement if it feels any employee is unjustly charged.

Section 4.3 of the collective-bargaining agreements provides: "The Employer shall have the right to reject any applicant for employment."

There is no claim Respondent improperly maintained the "not eligible for rehire list" or improperly placed and/or retained Sweeting's name on the list. Respondent does not claim these provisions of the collective-bargaining agreements waived any employee's statutory rights under the Act.

*B. Sweeting's Placement on the List*

Sweeting worked for Respondent three times prior to 1996, once for as long as 6 months. The actual dates of these employments were not placed in evidence and their proximity to 1996 cannot be determined. According to Baker, Sweeting met the requirements of all of its employees during these three employments. In 1996, Sweeting was dispatched to one of Respondent's jobsites, referred to as the Bloomingdale's store at the Stanford Shopping Center, by IBEW Local 332 in San Jose, California. Sweeting's immediate supervisor was Michael Ruiz. Ruiz has worked for Respondent for 5 years, and has been a foreman the last 3 years.

According to Ruiz, Sweeting was a difficult employee for the 8 days he remained on the Bloomingdale's job, testifying:

> [Sweeting] was pretty disruptful, just was causing a lot of problems, looking for ways to cause problems for the company, just taking up a lot of my time and I only had a certain amount of time for everyone, and he seemed to want to take up all my time, all the time, just either causing problems or bringing issues up that weren't real issues. He just kind of wanted to push me around a little bit on this other job. And since there was no production being done, we were more dealing with each other and dealing with issues, than getting anything done on the job.
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> . . . .
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> [Sweeting] tended to—when he would be working in one area doing something, and if he saw me talking to someone else, he'd tend to walk up and kind of want to know what was going on, or he'd tell the other employees, you know, hey, Mike can't tell you that, he's not legal to tell you this, or he has to tell this to a journeyman, he was pretty much coming behind me and telling the other employees things, oh, he can't do this, he can't do that, don't listen to him on that, stuff like that.
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> I sent him off to do one job, I came back, it wasn't done correctly, and he kind of knew it wasn't done correctly, and he took the stance that well, you know, you told the apprentice, not me, that's not my job, you're supposed to tell me if anything happens. Well, at the time I had an apprentice doing a job at a yard across the street, I sent Mr. Sweeting there, I said hey, the apprentice knows what's going on, you talk to him and he'll tell you what we're doing out there, which is moving some fixtures around, he said, okay, no problem, and he went out there. And then when I went and checked on him later, that's when I found out all this stuff that I asked to be done hadn't been done, and what was done was done incorrectly. And I just got the feeling that he knew that that was the problem, that he had done that incorrectly.
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> . . . .
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> We had a couple of situations where he was asked to install something, he installed it wrong or installed it twice, and I said, hey, you know, why did you put two of these in instead of one—oh, I guess I made a mistake, sorry.
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> . . . .
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> There was one issue where Mr. Sweeting, we have a disciplinary form at our shop, where if we have any problems with our employees we're supposed to write up a disciplinary form to let them know that we have a problem with it. It's not a firing, but we're looking at this issue and we'd like them to kind of solve that. And we had rules on this job, we were building the Bloomingdale's in the Stanford Shopping Center at the time, and Stanford Shopping Center had set some rules down that they only wanted us outside at lunchtime, that was it, they didn't want any of the employees out at break because it disrupted the mall. So, there was a situation, every guy that came on that job, they read the job rules to and they let them know they could not be outside.
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> . . . .
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> It was set up through the general contractor, which was given to Sasco, and then Sasco, we had to follow those rules that they gave us. And so we had a situation where one day one of the employees said, hey, you know, a couple, one of the apprentices and one of the journeymen are outside right now, and I knew that was a problem. So, I went out and there was a restaurant right around the corner from—you could walk out the front door of Blooming-

dale's and see the restaurant down about 50 yards, and Mr. Sweeting and an apprentice, another apprentice, were both sitting at the table at break time, which is 10:00 o'clock in the morning, and they knew they weren't supposed to be out there.

So, I walked over to them and I said, hey Joe, you know, you know you're not supposed to be out here, Tim, the other apprentice, same thing, you know, you know you're not supposed to be out here. Oh, I just wanted some fresh air, but we knew the rules, we couldn't have that. So, I wrote up a disciplinary form for both employees at the time.

Baker investigated the situation, discussing the problems Ruiz was having with Sweeting first with the Job Superintendent Kurt Chacon, who informed Baker there was a possibility Sweeting may be "terminated not for rehire because there was a chain of events that would lead up to that logic of why he would not be rehired." Specifically, according to Baker, Chacon said:

> The first day that he [Sweeting] was on the job he was requested to go do and perform a task, and he had a problem with direction, and making an issue of union procedures. And I said, well, were they out of line, he says, it was a simple task of just removing fixtures from a trailer. I says, okay, and he said, well, that's what started the thing in motion.
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> Then the next incident, he said that Mike had him—gave him other tasks to be done and that Joe was very specific to challenging every request where he would detail it out to the point of where do you want this work, where do you want this fixture going, and as far as exact locations to where he was making an overkill of direction that was not standard procedure in our industry.
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> And then he says, even after he'd give direction, Mike Ruiz gave him direction, Joe Sweeting, that he would, when he would return, that either Joe was out of his working area or he would come up with another explanation of why it didn't get done like he was directed for the task to be done. And this was an ongoing thing through those eight days.
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> He would also get involved, Joe Sweeting would also get involved with other individual's tasks, when they were given direction. And this is noted on one of the reports that was through the grievance procedure that the general foreman, Don Durbin, in Joe Sweeting's presence, was talking to another crew and watching a prefab incident on putting materials together for fixtures, and stopped and noticed they weren't doing it properly and give them some direction as to how to do it in a different manner to make it an easier installation, and then left.
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> Upon Don Durbin's leaving, Joe Sweeting walked over to the two individuals that were working, which he had nothing to do with, and told these other two individuals that that is not procedure, you shouldn't be listening to him. And which in turn, the other individuals responded that it had nothing to do with Joe, Joe what's the big deal, I mean he's tried to show me what to do easier. And so once again he was being instrumental in interfering with other people on the job site on tasks that didn't even apply to him.

On the day Sweeting was laid off, Baker then met with Durbin and Chacon and went to the jobsite, and after discussions with Durbin and Chacon, reviewed Sweeting's employment with Respondent and with Ruiz. Ruiz informed Baker he did not have any difficulty with Sweeting as an individual but he could not get Sweeting to follow directions and Sweeting challenged "everything" Ruiz did. Ruiz also informed Baker that Sweeting was "even getting involved with other people's tasks, and he says, it's just very disruptive and he said, I can't deal with where he's going with these things." Baker concluded Sweeting "had other agendas other than working, trying to do tasks that he was hired to do, and we don't need that on other jobs." Thus, on April 30, 1996, Sweeting was given a notice of termination marked, "reduction of work force and not acceptable for rehire." Sweeting was then placed and retained on the "not eligible for rehire list."

While Sweeting testified he did not have any problems with Ruiz, he wrote a grievance to IBEW Local 332 on May 1, 1996, where he stated:

> No matter how much was done it never seemed to be enough. Things progressed the next few days, although I noticed job conditions were lacking adequate bathroom facilities, there were dark and dangerous conditions inside the building, a lack of drinking water, dirt and dust inside the building (respirators were available upon request).

Sweeting asserted in the grievance that the first day at work he complained about the method Respondent calculated the pay of five electricians, including him. Sweeting then commented Ruiz assigned him to work with an apprentice unloading fixtures, which he felt was in retaliation for his complaint the preceding day. According to Sweeting, "[Ruiz] told me the apprentice knows what to do, just go over and help him out. Not only was this humiliating, but very degrading. I was under the impression that the foreman lays out the journeyman and consequently the journeyman supervises the apprentice." The grievance contained other asserted wrongs that Sweeting denominated "an hostile environment." He requested, among other relief, the ineligible for rehire be rescinded.

On September 13, 1996, Sweeting filed a charge against Respondent in Case 32–CA–15673 claiming he was terminated "in retaliation for his exercise of union and/or other protected concerted activities." By letter dated October 23, 1996, the Regional Director for Region 32 dismissed this charge because:

> The investigation disclosed that the issue of your termination, as well as allegations that before your termination you had been singled out for unfair or discriminatory treatment for raising work issues with the Employer, were the subject of grievance proceedings which were brought before a joint labor-management grievance committee, established under the Employer's collective bargaining agreement with the Union. The investigation further disclosed that the joint committee heard evidence concerning your discrimination allegations, found that they had no merit, and denied you grievance. . . . I am therefore, dismissing the charge in this case.

### *C. The Events of January and February 1998*

In January 1998, Sweeting accepted a referral from Local 617 to a job Respondent was running in Menlo Park, California. Sweeting informed the dispatcher, Paul Regnier, that more than a year before he had been terminated by Respondent and designated ineligible for rehire. Regnier informed Sweeting

that since the Bloomingdale's job was in another local's jurisdiction and occurred more than 1 year ago, there should not be any problems. If there was a problem, Sweeting was to call Regnier. The dispatch instructed Sweeting to report to a foreman named Bob Burns. When Sweeting found Burns, the general foreman, Ruiz, was also present.

When Ruiz saw Sweeting, he asked him to come outside with him. Ruiz informed Sweeting he remembered him and "he was going to turn me around, he did not want me on his job."[3] Sweeting admitted Ruiz told him "I remember you were in my face." He did not dispute Ruiz told him he did not want him in his face. Sweeting denied being in Ruiz' face. Sweeting then asked for use of a telephone. Ruiz took Sweeting to the job trailer, which is divided into three sections, and gave Sweeting access to a telephone. Sweeting telephoned Regnier informing him he had been turned around. Regnier asked to talk with Ruiz. Both Sweeting and Regnier testified Ruiz gave Regnier, as one of the reasons for turning Sweeting around, a lawsuit. Sweeting admitted Ruiz did not tell him one of the reasons he was not hired was a lawsuit, he overheard the conversation with Regnier. Regnier and Ruiz had two telephone conversations and Regnier was not sure in which conversation contained the reference to a lawsuit.

Regnier initially testified, when he asked Ruiz why he was turning Sweeting around, Ruiz said, "he had a personal problem with this particular individual at a prior time and a different area." Regnier then inquired how long ago the problem occurred and if Respondent had a 1-year policy. Regnier could not recall Ruiz' answer. Regnier then said he would check with Respondent's personnel office. When asked again to relate the conversation he had with Ruiz, Regnier testified, "Ruiz said that it was personal, that Mr. Sweeting had caused Mr. Ruiz a great deal of aggravation at some prior point, and brought him up on charges or something like that, and it was personal."

After a leading question of whether a lawsuit was mentioned, Regnier testified:

> Either a lawsuit or a legal action, because I knew it was legal. And in fact, I'm not sure he said lawsuit, because I didn't know if it was an internal thing with the IBEW, we have internal ways of taking care of things, or it went beyond that to the NLRB, or to civil lawsuit or something else, so I really don't know if it was a lawsuit at this time."

Regnier, again after a leading question on direct examination, testified as follows:

> Q. [In] connection with his mentioning this legal proceeding, did Mr. Ruiz say anything about his boss?
>
> A. I can't honestly say that I recall that, I'm sorry to say.
>
> Q. Do you recall whether he said that his boss would skin him if he allowed Mr. Sweeting to stay on the job?
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> A. Ruiz said that. He said that to me, Mr. Ruiz said those words to me on the phone call.

On cross-examination Regnier testified:

> Q. And do you recall Mr. Ruiz—do you recall asking Mr. Ruiz for more explanation as to why he wouldn't allow Mr. Sweeting on the job site?
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> A. Only at the beginning of the conversation when he said that he's turned around.
>
> Q. And do you recall Mr. Ruiz telling you, saying something like, look, Paul, I don't really have to give you a reason why I'm turning him around?
>
> A. Yes, he did.
>
> Q. And do you recall that your response to that was, look, I'm trying to resolve his, off the record, tell me more?
>
> A. Yes.
>
> Q. And do you recall Mr. Ruiz explaining that at a prior time he had problems with Mr. Sweeting on the job site?
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> A. Personal problems, a personal thing, litigation.
>
> Q. Well, do you recall him saying he had personal problems and your responding that, well, that's in the past, this is the present, can't you put that behind you, you know, things may have changed?
>
> A. In a different place, different time and things change.
>
> Q. Okay. And do you recall Mr. Ruiz then saying the problems that I had with Mr. Sweeting weren't the kinds of problems that would change, and in fact it was determined that my reasons for making—for determining he was ineligible for rehire then were upheld, that this wasn't just an off the wall decision?
>
> A. He said that he was the victor and Mr. Sweeting lost whatever this legal thing was.

Sweeting claimed Ruiz told Regnier:

> I'm going to turn him around, he caused a lot of problems for this company, there was a big lawsuit, and I do not want him on this job, my boss would chew me out if I let him stay here.[4]

I do not credit Sweeting's testimony except where it is credibly corroborated or constitutes a statement against his interests based on his demeanor. He did not appear forthright and candid. Moreover, on occasion he engaged in hyperbole and was not responsive to questions on cross-examination.[5] He ap-

[3] The phrase "to turn around" a job applicant was used in this proceeding to denote the supervisor determined not to hire the job applicant.

[4] Regnier testified Ruiz claimed his bosses would "skin him if he allowed Mr. Sweeting to stay on the job?" This testimony was elicited through a leading question. The comment may well have regarded Respondent's consistent policy concerning turning around all applicants whose names appear on the "not eligible for rehire list," rather than any discriminatory motive.

[5] For example, when asked if he felt humiliated and degraded about the assignment in 1996 to help an apprentice unload fixtures from a trailer, he replied:

> Q. Well, this helps refresh your recollection, Mr. Sweeting, doesn't it, that during those eight days you were working at Sasco, you felt humiliated and degraded by the fact that there was an apprentice that you had to work with?
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> A. No.
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> Q. Well, isn't that what you say in your letter?
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> A. No, it's not. This was one particular job assignment, the procedure is that the journeyman is laid out and the apprentice works with the journeyman. In this particular incident the apprentice was laid out and I, the journeyman, was supposed to work with the apprentice. That is completely against union policy.
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> Q. And in page two of your letter, you're referring to, when you talk about the foreman, you're referring to Mike Ruiz, aren't you, the first paragraph on page two?
>
> A. Yes.

peared uncooperative during cross-examination. For example, when asked what he was referring to in the last paragraph of his letter, he replied, "It seems self-explanatory to me." Sweeting also volunteered information.

There is no claim Ruiz indicated his bosses displeasure would be based on Sweeting's having filed a grievance or charge with the Board. When Regnier talked with Baker right after talking with Sweeting and Ruiz, there was no mention of a lawsuit or grievance. Regnier was unsure of whether Baker agreed Respondent had a 1-year policy concerning the "not eligible for rehire list." The record evidence clearly demonstrates Respondent did not have such a policy. Some individuals on the current "not eligible for rehire list" have been on it since 1996, others since 1997.

Ruiz testified Regnier initially brought up the subject of the prior legal action. According to Ruiz, during the telephone call:

> Just basically we went over the same issues, why are you not hiring him, is there any reason, could we kind of go off the record and can you tell me why. And I just told him basically the same thing, I've had previous dealings with Joe, I had a lot of problems with him on another job. And we talked about a couple other issues and I said, you know, basically the guy had filed a grievance against us once, and had failed on that one, and I knew that at least the first time I had gotten rid of him, or laid him off, I was right. And so I figured I had the right, at that point, to still turn him around and it wasn't a problem.
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> Q. When you say—did Mr. Regnier say anything in response to that?
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> A. He said basically, you know, you cannot turn a person around for any kind of lawsuits or grievances, or anything to that effect, and I said, I know that, I know I can't do that, that's not the reason I'm turning him around, I just don't want him on the job because I've dealt with him before.
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> Q. Did you have any other conversation, any other words spoken between you and Mr. Regnier then in the second phone conversation?
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> A. We just basically went over the same thing, we rehashed just like I talked about. I said I didn't really want to hire him again. After he explained to me I couldn't not [sic] hire him because of the lawsuit, I told him I knew that. We had maybe a couple of words, I can't remember exactly what they were, and then he just hung up and that was the last I heard from him.

Ruiz was unclear whether he first called the office before informing Sweeting he would be turned around. Two statements he gave, including an affidavit, were contradictory. I do not find this contradiction discredits all of Ruiz' testimony. Ruiz consistently related the reasons for his dissatisfaction with Sweeting's work prior as well as subsequent to Sweeting filing the grievance and charge. Based on Ruiz' demeanor and the corroborating testimony of Baker, who appeared open and forthright, I conclude Ruiz' testimony concerning his disaffection with Sweeting as an employee was based on Sweeting's actions at the Bloomingdale's job in 1996 is credible. Ruiz was essentially a truthful witness, appearing to pay close attention to the questions he was asked on both direct and cross-examination and readily answered the questions.

Sweeting, acting upon Regnier's advice, called Ruiz and asked him "to allow bygones be bygones, I apologized to him for anything that might have happened in the past, and I explained to him that I needed a job and can we just—I'm willing to do whatever it takes to work this out." According to Sweeting, Ruiz, in his reply "was adamant and said no, I do not want you on this job. He said, I remember when you were in my face and I just do not want you on this job."

Sweeting was referred to the same Menlo Park job in February and was again turned around by Ruiz. According to Sweeting, Ruiz was shown the dispatch slip and instructed a foreman named Eric to turn Sweeting around. When another electrician asked Eric why, Ruiz informed Eric not to say anything. Sweeting has not received any other referrals to Respondent since February. These two occasions were the only times Sweeting has been turned around.

## Analysis and Conclusions

Respondent denies any wrongdoing, arguing Sweeting was listed on the "not eligible for rehire list" prior to filing a grievance or charge and his listing renders him ineligible for hire. The General Counsel argues Section 8(a)(4) of the Act is to be broadly construed. Citing *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972). That Sweeting's discharge in 1996 was valid does not alter Respondent's culpability if it is found the refusal to hire him in 1997 was motivated in part, because he filed a grievance and charge concerning the 1996 termination. Citing *NLRB v. Whitfield Pickle Co.*, 151 NLRB 430 (1965), enfd. in part 374 F.2d 576, 582–583 (5th Cir. 1967); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239–241 (1978); *United Technologies Corp. v. NLRB*, 777 F.2d 90 (2d Cir. 1985); *Accent Moving & Storage,* 305 NLRB 203, 209–210 (1991). That the grievance and charge were not found to be meritorious, does not alter the culpability of an employer who refuses to hire a job applicant because they filed a charge. *Accent Moving & Storage*, supra.

The General Counsel also avers the liberal construction of Section 8(a)(4) requires I find Ruiz' mention of a prior confirmation of the 1996 decision to terminate Sweeting establishes a prima facie case and Respondent has not demonstrated the 1996 factors were relied on as the predicates for the turnaround. As a remedy, the General Counsel seeks expungement of all references to the turnarounds from Sweeting's record, appropriate backpay and benefits, and removal of Sweeting's name from the "not eligible for rehire list." Citing *Virginia Electric Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *Postal Service*, 314 NLRB 227 (1994); and *Cirker's Moving & Storage Co.,* 313 NLRB 1318 fn. 3 (1994).

In determining if a violation of Section 8(a)(4) of the Act occurred the Board uses the causation test delineated in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1998), cert. denied 455 U.S. 989 (1982). To ascertain whether discrimination occurred, the question in this case is the Respondent's motive for taking the adverse action. Motive is a factual question usually resolved through inferences drawn

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Q. And you're referring to an incident where Mr. Ruiz asked you to work with this apprentice in getting the job done, isn't that right?

A. Working with an apprentice, yes.

Q. Okay. And don't you state, "He" meaning Mr. Ruiz, told me the apprentice knows what to do, just go over and help him out," and don't you state, "Not only was this humiliating but very degrading." You state that, didn't you?

A. In the letter, yes.

from circumstantial evidence. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401–403 (1983), the Supreme Court approved the test for unlawful motivation stated in *Wright Line,* supra. Under *Wright Line,* a violation of the Act is established by a showing the Respondent's opposition to protected activity was a motivating factor in the Respondent's decision to take adverse action against an employee, unless the employer is able to demonstrate, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity.

If the Respondent's proffered reason for a discharge or other adverse action is shown to be a mere pretext to disguise discrimination, the inquiry ends, for at that point, it is clear the only motive for the Respondent's action was an unlawful one. See *Wright Line,* supra. The Board's approach to Section 8(a)(4) of the Act generally has been a liberal one in order to fully effectuate the Section's remedial purposes and, includes within its protections job applicants, the Section bars discriminatory conduct. *General Services, Inc.,* 229 NLRB 940 (1977).

I find the General Counsel has failed to demonstrate such a discriminatory motive in this case. There were no false reasons advanced. Ruiz and Baker related the prior conduct that led to Sweeting being placed on the "not eligible for rehire list" prior to his filing the grievance and charge. His retention on the list was not shown to be unusual or predicated on his filing the grievance and charge. There is no evidence Respondent hired any applicants whose names appeared on its "not eligible for rehire list" or otherwise treated Sweeting disparately. Twice Regnier recalled Ruiz explained his action as predicated on his past work experience with Sweeting. During cross-examination, Regnier admitted Ruiz informing him the type of work problems he had with Sweeting would not change over time and further testified:

> Q. Okay. And do you recall Mr. Ruiz then saying the problems that I had with Mr. Sweeting weren't the kinds of problems that would change, and in fact it was determined that my reasons for making—for determining he was ineligible for rehire then were upheld, that this wasn't just an off the wall decision?
>
> A. He said that he was the victor and Mr. Sweeting lost whatever this legal thing was.

Regnier's testimony indicates Ruiz mentioned the disposition of the grievance and/or charge as an affirmation of his decision to terminate Sweeting and place his name on the "not eligible for rehire list," and not as the reason for his decision to not hire Sweeting in 1998. Moreover, there is no evidence Ruiz could have hired Sweeting inasmuch as his name was on the "not eligible for rehire list." The unrefuted testimony of Baker, whom I have found to be a credible witness based on his demeanor, is that a foreman or superintendent cannot hire anyone who is on the list. Sweeting was not shown to have been treated disparately from any other individual on the list. Thus, there is no evidence Sweeting possessed a chance of being employed by Respondent regardless of who was assigned as the foreman or supervisor running the job.

There is also no evidence Sweeting possessed a chance of being hired by Respondent had he not filed the grievance and charge. There is no evidence Sweeting's name was retained on the "not eligible for rehire list" because he filed the grievance and charge. Assuming Ruiz held animosity against Sweeting because he filed the grievance and charge, there is no evidence Ruiz had any input into the retention of Sweeting's name on the list. Baker's litany of reasons for keeping Sweeting on the list does not include or infer Sweeting's subsequent actions of filing a grievance and charge were considered at the annual meetings to determine who should remain on the "not eligible for rehire list." There is no claim Baker's reasons for placing and retaining Sweeting on the list were based on unlawful motivation.

Moreover, there was no evidence that clearly established Ruiz knew what Sweeting filed to test the 1996 decision to terminate his employment and place him on the "not eligible for rehire list." Assuming Ruiz could have hired Sweeting despite his placement on the list, the initial and consistent reasons given by Ruiz and Baker for turning Sweeting around was he did not want to work with an individual he considered a trouble maker based on Sweeting's poor job performance and attitude in 1996 while working at the Bloomingdale's job. The validity of these reasons was never convincingly refuted. That Sweeting previously worked for Respondent is not demonstrative he was a satisfactory employee in 1996. The record does not establish how long before the 1996 events Sweeting worked for Respondent, where and under what circumstances. Perhaps Sweeting has preferences in the working conditions he is subjected to on the job and these other instances did not test these limits. As Baker noted, that Sweeting worked satisfactorily three times before the Bloomingdale's job was what he would expect of any employee.

Under these circumstances, I find Ruiz mentioning Sweeting's attempts to question his 1996 termination and placement on the "not eligible for rehire list" does not establish, a fortiori, a violation of Section 8(a)(4) and (1) of the Act. There is credible evidence by Ruiz the filing of the grievance and charge were initially raised as corroboration of the correctness of Respondent's decision to terminate Sweeting and place his name on the "not eligible for rehire list," to Regnier who inquired whether these filings were the basis for turning around Sweeting. Ruiz replied he knew these actions could not form the basis for his action, that it was his previous work experience with Sweeting that was the predicate for his decision not to hire Sweeting. For the previously discussed reasons, I find Ruiz' testimony on this point to be credible.

Regardless of what Ruiz said, the uncontroverted evidence established Sweeting could not have been hired by Ruiz or any other supervisor while his name remained on the "not eligible for rehire list." Thus, even if I had found Ruiz' reason for not hiring Sweeting was motivated by animus caused by Sweeting filing the grievance and/or charge, I find Respondent established the same action would have taken place in the absence of Sweeting's protected conduct. There is no showing of a lack of good faith by Baker. Respondent gave credible and unrefuted evidence no supervisor could have hired Sweeting because his name was on the "not eligible for rehire list." I also find Respondent convincingly established Sweeting's name was placed on the list for good cause and there is no credible evidence his name was retained on the list for proscribed reasons. Sweeting was not hired because of the objectionable behaviors he engaged in during the Bloomingdale's job. Respondent had sufficient lawful reasons not to hire Sweeting.

I therefore conclude Respondent has not violated Section 8(a)(4) of the Act and the complaint should be dismissed.

## CONCLUSIONS OF LAW

1. The Respondent, Sasco Electric, d/b/a Sasco Valley Electric, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the compliant.

## ORDER[6]

The complaint is dismissed in its entirety.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.